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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STONE BOAT YARD,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Sec 8(a) (5) "duty to bargain," require a company to continue contributions to union fringe benefit funds after the expiration of the union contract where the company has attempted to negotiate but the union has decided to avoid negotiations for an extended period of time?

2. Is the Board's remedial order, requiring retroactive payment by the company to the union fringe benefit funds permissible, under the Act, on the facts of this case?

3. May a union escape compliance with the six-month Statute of Limitations on filing charges with the NLRB by avoiding bargaining or any other contact with the bargaining unit where the charge arose?

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IN THE

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No. _____

SONE BOAT YARD,

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v.

THE NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Stone Boat Yard petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered in this case on September 6, 1983.

OPINION BELOW

The opinion of the Court of Appeals (App A, infra) is reported at 114 LRRM 2407. The findings of fact, conclusions of law, and order of the Administrative Law Judge and the National Labor Relations Board (App B, & App B-1), infra) are reported at 264 NLRB No. 130.

JURISDICTION

The decision of the Court of Appeals was entered on September 6, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (i); The Court below had jurisdiction per 29 U.S.C. 160 (e).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat 136, 73 Stat 519, 29 U.S.C. 151 et seq.) are set forth in Appendix C.

STATEMENT OF THE CASE[1]

A. Findings of Facts by the Administrative Law Judge and by the National Labor Relations Board.

The Company was signatory to a collective bargaining agreement with the Union which had effective dates of July 5, 1977, terminating June 30, 1980. That contract required the Company to make specified cents per hour contributions to the union health & welfare and pension funds. (Board Dec. App. A)

On April 15, 1980 the Union gave to the Company a written notice of termination of the contract which invited negotiations and requested an immediate reply. The Company responded in writing and indicated that it intended to offer substantial changes in the entire contract effective July 1, 1980.

The Union officials decided not to negotiate with the Company until they obtained a settlement in the Master Agreement — an event, as it turned out, that didn't happen until late August, 1980 — almost three months after the Union had sent their contract termination notice to the Company. (ALJD)

Company official Volker, not having received a reply from his letter to the Union, attempted several times, in the month of June to contact the Union office, but was always advised by that office that Union officials were unavailable, out of town, or tied up in Master Agreement negotiations. (ALJD) The Union never informed the Company of the Union official's decision not to negotiate with the Company until after settlement was reached in the Master Agreement.

[1]The following abbreviations and shorter names will be used throughout this document:

(a) Company refers to Stone Boat Yard, Union refers to the United Brotherhood of Carpenters and Joiners America, AFL-CIO; Master Agreement refers to the Pacific Coast Metal Trades Master Agreement.

(b) Board refers to the National Labor Relations Board; ALJ refers to the Administrative Law Judge; The Act refers to the National Labor Relations Act as amended; Tr refers to the stenographic transcript of the administrative hearing; G.C. refers to Exhibits introduced in evidence by the General Counsel of the Board at the hearing; Res Ex refers to Exhibits introduced by the Company. Board Dec. refers to the Board Decision below, ALJD refers to the decision of the Administrative Law Judge's decision below.

Company official Folker, not having received a written response from the Union to his letter, and unable to contact union officials by telephone, had a meeting with his employees in June, 1980 and gave them a written report of the Company's economic progress and an analysis of the health & welfare and pension benefits the Company would be willing to provide after the expiration of the Union contract on July 1, 1980. (ALJD p. 5)

The Company ceased making payments to the Union fringe benefit funds as of July 1, 1980.

B. The ALJ's and Board's Decision.

The ALJ dismissed the Complaint in its entirety, finding that the Union was put on notice that the Company was going to offer a different fringe benefit package and not continue in the Union funds as of July 1, 1980, and that the Union was both unwilling and unable to negotiate with the Company prior to July 1. The ALJ also concluded that the Union's failure to exercise due dilligence prior to July 1 did not excuse their delay in filing a charge beyond the six-month Statute of Limitations, but the ALJ found it unnecessary to decide that issue because of dismissal of the Complaint on its merits.

The Board majority (Chairman Van Water, dissenting) adopted the ALJ's findings of fact but concluded that since there had been no "impasse" in negotiations between the Company and the Union, nor had the Company made a prior written offer consistent with the unilateral changes, and the Union had not "waived" its rights to bargain over fringe benefit plans, the Company's unilateral action amounted to a "refusal to bargain" by the Company. Further the Board ruled that the six-month Statute of Limitations began to run against the Union only when Union officials obtained a personal knowledge that the Company failed to make the July, 1980 contributions to the Union benefit plans, and therefore the charge filed on January 5, 1981 against the Company was "timely."

The Board's remedial order was that the Company had to make retroactive payments to the Union benefit funds, regardless of employee losses, plus make employees whole for any specific losses suffered.

C. The 9th Circuit's Review of the Board's Decision and Order.

On the merits, the 9th Circuit deferred to the Board's expertise in promulgating a rule that an employer must provide a detailed written proposal to the Union on any changes to be made after a union contract has expired. The Court ruled that such a prior notification, is mandatory despite the Company's unsuccessful efforts to get the Union to the bargaining table and despite the Union's admitted avoidance of any negotiations with the Company for the period of months involved in the events of this case.

As to remedy, the Court ruled that it was not a penalty to require the Company to make contributions to a union benefit plan despite the lack of showing of any actual damages to employees nor was it the imposition of substantive contract terms on the Company.

As to timeliness, the Court ruled that the six-month's time limit for filing charges did not run against the Union until Union officials had actual knowledge that the Company ceased contributions to the union funds even through (1) the Union's own reopening notice, by its express terms cancelled such obligation (2) the Union avoided contact with the Company or its employees during this period of time (3) the Company gave the Union, written notice in advance, that it would propose substantial changes July 1, 1980.

REASONS FOR GRANTING WRIT

Question No. 1 — Does the Sec 8 (a) (5) duty to bargain require a company to continue contributions to union fringe benefit funds after the expiration of the union contract where the company has attempted to negotiate, but the union has decided to avoid negotiations for an extended period of time?

This question raises an important issue of federal labor law which has not but should be settled by this Court.

The rule is well established, and not called in question here, that an Employer cannot make so-called unilateral changes in hours, wages, and conditions of employment simply because the collective bargaining agreement which specified those terms had expired. *NLRB v Katz*, 369 U.S. 736, (1962), *Fibreboard Paper Products v NLRB* 379 U.S. 203 (1964).

The reason for this requirement of maintaining the status quo despite the expiration of the *contractual* obligation to do so is to provide the other party in the bargaining process (in the instant case, the Union) the *opportunity to bargain* prior to being presented with a *fait accomplit*. *Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939) cited with approval, more recently, in NLRB v *Alva Allen Industries*, 369 F.2d 310 (CA-8; 1966)

Where the opportunity to bargain has been extended to the other party, the requirement to maintain the status qyo with its ban on unilateral action disappears. (Brd Dec. below. See also *AAA Motor Lines, Inc.* 215 NLRB 793 [1974])

The error committed below, which is raised by this Request for Cert, is that the Board adopted a *per se* rule that an employer can only make "unilateral" changes which are consistent with a previously submitted employer proposal.

The Board refused to consider *why* no previous proposal was submitted in this case. Clearly, it was because the Union, not the Company, refused to enter into negotiations, the Union "preferring" to bargain with the Company only after it had reached a settlement in the Master Agreement negotiations — an event, as it turns out, that didn't occur until 2½ months after the Union "reopened" the Company's contract for negotiations and a full month and one-half after the Company's "unilateral action."

The Board's decision both ignores and flies in the face of the statutory definition of the obligation to bargain., Section 8 (d) reads, in relevant parts,

> "... to bargain collectively is the performance of the *mutual* obligation of the employer and the representative of the employees to *meet* at reasonable times and *confer* in good faith ..." (Emph. added)

Here the facts are clear that the Company was attempting to establish meetings to confer with the Union so that the Company could make a proposal for changes in the contract. Equally clear, and undisputed in the record, is that the Union did not respond to any of the Company's attempts to begin negotiations, and had, in fact, decided not to negotiate with the Company for an extended period of time.

The Board's rule leads to the astounding result that the party attempting to negotiate (the Company) is found to have "refused to bargain in good faith," while the other party (the Union) which avoided negotiations, during the crucial time period when the contract expired, attains its bargaining objective requiring the Company to remain in the union fringe benefit plans after the contractual obligation to do so has expired and until such time as the Union has decided to be available to this individual company for negotiations.

Such a ruling is in direct conflict with the statutory language which imposes a *mutual* obligation on a company and a union to meet and confer. In the instant case, the Union admits and the Board below found, that the Union was unavailable for bargaining for an extended period of time when the events in issue here occurred.

It is respectfully submitted that the issue raised in this case — the finding of a violation of the duty to bargain by the party seeking to bargain, in the face of the other party's conscious avoidance of the bargaining obligation — raises an important question of federal labor law, indeed the very purpose of the Act itself, and therefore should be decided by this Court.

Question No. 2 — Is the Board's remedial order, requiring retroactive payments by the Company to the Union fringe benefit funds required, under the Act, on the facts of this case?

The Board order below not only requires the Company to make individual employees "whole" for any loss in fringe benefit protection caused by the Company's discontinuance of payments to the Union's fringe benefit funds; in addition, the Board order requires retroactive payment by the Company of its cents per hours worked contribution to those fringe benefit funds — in effect "double coverage" with no showing of employee loss.

It is well settled that the Board's orders are to be "remedial," not penal or punitive. *Republic Steel Corp. v NLRB*, 311 U.S. 7, 10 (1940). (1940).

Petitioner respectfully submits that there is a conflict in the Circuits on the question of the standard a Circuit Court should follow in enforcing a Board order requiring retroactive payments to union fringe benefit funds following "technical" violations.

Sec 10 (e) of the Act specifically authorizes the Circuit Court to modify or set aside Board orders, in the reviewing or enforcing process. The Second Circuit, in *Carpenter Sprinkler Corp. v NLRB*, 605 F.2d 60 (CA-2; 1979) ruled, in a factual situation very similar to the present case, that the imposition of retroactivity liability on a company for health care benefits, with no showing of employee loss and no offset for a company sponsored plan was "harsh" and would not be enforced. In contrast, the 9th Circuit, in the instant case, simply brushed aside an analysis of this issue by concluding that the Company was simply being required to pay what it had unlawfully withheld.

Petitioner requests that this Court resolve the conflict between the approach adopted by the 2nd Circuit in analyzing the real effect of a Board order and the contrasting *per se* remedy automatically imposed by the 9th Circuit in the instant case.

Question No. 3 — May a Union escape compliance with the six-month statute of limitations on filing charges with the NLRB by avoiding bargaining or any other contact with the bargaining unit where the charge arose?

The Board and the 9th Circuit both ruled that the six-month Statute of Limitations on filing charges with the Board began "running" only when the union leadership obtained personal knowledge that the Company failed to make the fringe benefit payments on July 1, 1980.

The Union filed its charge on January 7, 1981 — more than six months after the violation by the Company occurred.

As the Court has observed, in *Bryant Mfg. Co., sub nom IAM Lodge 1425*, 362 U.S. 411 (1960) the purpose of a short period for filing claims, in the area of labor relations, is much more than merely a guard against stale claims or witnesses with hazy memories. As this Court reasoned, in *Bryant*, labor legislation entails the adjustment and compromise of competing interests, which in the abstract may seem irreconcilable, but which Congress, as the expositor of the national interest, in fact, resolves.

In other words, there is an important federal question involved in the prompt resolution of labor disputes.

It is respectfully submitted that the rule followed below frustrates this clearly announced federal policy when it suspends the running of the Statute of Limitations for an extended period of time while the Union leaders avoided their statutory obligations to represent the Company's employees and pursue collective bargaining negotiations with the Company.

Had the Union followed up its letter reopening negotiations with the Company and terminating the Company's contractual obligation to continue the fringe benefit payments, the Union would have had "personal knowledge" of the Company's discontinuance of these payments. It was only because the Union avoided negotiations with the Company altogether, from April 15 through late August, 1980 that the Union lacked the "personal" knowledge to start the six-month period running.

It is respectfully submitted that the rule followed below is inconsistent with clearly enunciated federal policy, and should be reversed.

CONCLUSION

The facts in this case are simple and not at all in dispute.

It is not disputed that the Company sought bargaining on all aspects of the labor contract. It is equally undisputed that the Union officials, by their own decision, avoided any bargaining at all with this Company during the crucial period before and after the expiration of the labor contract.

Notwithstanding these undisputed facts, the Board has found that the Company, which sought bargaining, is guilty of "refusing to bargain," and the Union, which avoided bargaining, is entitled to gain its bargaining objective, i.e. requiring the Company to continue to participate in the Union fringe benefit plans.

Moreover, an incredibly harsh penalty, namely bearing the cost of duplicate fring benefit plans is imposed on the Company and further, the Union by avoiding its duty to the Company to bargain, and its duty to its members to represent, has also been granted an exemption from the federal policy of requiring that violation of the Act be brought to the Board's attention within six months of the date that they occur.

It is respectfully submitted that such a result is not only grossly unfair to this particular Company but is also inconsistent with federal labor policy, and as such, should be reviewed by this Court.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-7594, 82-7752
NLRB No. 32-CA-3304

SONE BOAT YARD,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD, and UNITED BROTHERHOOD OF CARPENTERS and JOINERS OF AMERICA, AFL-CIO,

Respondent,

VS.

CARPENTERS LOCAL UNION NO. 1149,

Intervenor,

[Filed September 6, 1983]

Petition for Review and Cross-Application
for Enforcement of an Order of the
National Labor Relations Board
Argued and submitted June 15, 1983

Before: MERRILL, TANG, and NELSON, Circuit Judges.

TANG, Circuit Judge:

Stone Boat Yard (Stone) petitions this court for review of a decision and order issued by the National Labor Relations Board (Board). The Board found that Stone had engaged in an unfair labor practice by unilaterally ceasing to make payments to the union's health, welfare, and pension plans in violation of sections 8(a)(1) and (5) of the National Labor Relations Act (Act), 29 U.S.C. S 158(a)(1), (5). 264 N.L.R.B. 130 (1982). The Board filed a cross-application for enforcement of its order against Stone.

The question presented is whether Stone committed an unfair labor practice by making unilateral changes in an expired cointract after union delay, but before bargaining impasse. The union delayed pending its negotiations of a master agreement that had always before served as the precursor to and the model for Stone's independent agreement with the union.

The Board concluded that Stone had made unlawful uilateral changes in the terms and conditions of the contract because it did not give the union detailed notice of the proposals before implementing them. The Board's decision is based on a reasonable interpretation of the Act. We therefore grant enforcement.

I
BACKGROUND

The collective bargaining agreement of Stone Boat Yard, an independent shipbuilding company, with Local 1149 of the United Brotherhood of Carpenters and Joiners was traditionally based on a master agreement between a multi-employer trade organization, the Pacific Coast Ship Builders Association, and the union.

Independent shipbuilders, such as Stone, have customarily waited until the master negotiations were completed, and they have then generally agreed to the terms of the master bargaining agreement. The most recent agreement between Stone and Local 1149 appears to be a modified version of the master agreement.

The present controversy grew from Stone's failure to negotiate and implement a new collective bargaining agreement before the completion of the master agreement. On April 15, 1980, the Carpenters' Council sent notice to all signatory employers, including independents, that the master agreement was to expire on June 30. Five weeks later, on May 21, Stone sent a one-sentence letter to Local 1149: "This notifies you ... that it is the intent of Stone Boat Yard, Inc. to offer substantial changes in the entire contract effective 1 July 1980." This letter was received by Local 1149's financial secretary and business agent, Ted Knudson, shortly before May 29, when negotiations on the master agreement were scheduled to begin in Portland.

Knudson appears to have been preoccupied with the daily negotiations in Portland until the last week in June, when the Council and the

Association drafted a tentative master agreement. During this time, Stone President Richard Folker called several times for Knudson to initiate contract negotiations. Local 1149's receptionist told Folker that the union officials were unavailable because of the ongoing negotiations for a new master agreement.

In late June, while Knudson was still in Portland, Folker called an employee meeting and announced Stone's new health insurance program. On July 1, 1980, immediately after the expiration of the most recent collective bargaining agreement, Stone ceased payments to the union's health and welfare and pension funds. In place of those funds, Stone instituted a company-paid health insurance plan and proposed to implement a new retirement plan by January 1, 1981.

Local 1149 had no direct notice of Stone's changed fringe benefits until July 24, 1980, when Folker telephoned Knudson to say that Stone would not sign the master agreement. In either late July or early August, Knudson first learned that Stone had ceased payments to the union health and welfare and pension funds.

In mid-July the rank and file rejected the negotiated master agreement. Further negotiations ensued and on August 15 the new master agreement was ratified. Immediately thereafter, on August 21, Knudson sent a formal letter to Stone describing the new master agreement, stating that fringe benefits were due retroactive to July 1, and announcing the contract's availability upon its return from the printers. Representatives of Local 1149 and Stone subsequently met, but Stone did not sign the contract.

On January 5, 1981, Local 1149 filed an unfair labor practice charge with the Board. The union claimed that Stone's unilateral changes in health insurance and pension contributions constituted a refusal to bargain within the meaning of section 8(a)(1) and (5) of the Act. The administrative law judge (ALJ) hearing this case dismissed the union's charges, concluding that Stone's May 21 letter was sufficient notice of an intended change to excuse the company from its continueing obligations under the expired collective bargaining agreement.

On review, the Board reversed the findings of the ALJ. The Board held that Stone's one-sentence letter of May 21 gave no details as to

contemplated changes and thus failed to excuse the company's continuing obligations under the old agreement. As a remedy, the Board ordered Stone to make payments to the union's health and welfare and pension funds. The payments were to be retroactive to July 1, 1980, and were not reduced to reflect payments Stone had made for its new company-sponsored health plan.

Stone challenges the Board's decision in three respects: (1) the company's unilateral changes were justified by the union's delay in bargaining; (2) the unfair labor charge is time barred; and (3) the remedial order is improper as a penalty or as tantamount to imposing a contractual settlement on one of the bargaining parties.

II
Unilateral Change in the Terms and Conditions of Employment

Section 8(a)(5) of the Act generally prohibits unilateral changes in the terms and conditions of employment reflected in an expired collective bargaining agreement. *NLRB v. Carilli*, 648 F.2d 1206, 1214-15 (9th Cir. 1981). An employer is required to maintain the status quo until the parties negotiate a new agreement or bargain in good faith to impasse. *Id.* at 1214.

Stone does not deny that it made unilateral changes in the health care and pension terms of the expired contract. Instead, the company argues that the union's failure to respond to either its May 21 letter or its phone calls in late June constituted an attempt to avoid or delay bargaining. This attempt, Stone contends, justified the implementation of unilateral changes.

The Board, however, concluded that Stone was not excused from its continuing obligation to maintain the status quo because Stone had failed to give notice to specific proposed changes. We uphold the Board's conclusion unless it is arbitrary and capricious. *NLRB v. United Association of Journeymen and Apprentices*, 704 F.2d 1164, 1166 (9th Cir. 1983). Furthermore, we will defer to the Board's interpretation of the scope of the bargainingf obligation under section 8(d) of the Act if it is "reasonably defensible." *See Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979). The fact that the Board disagreed with the ALJ has no effect where, as here, the disagreement does not

turn on the credibility of witnesses. *Alfred M. Lewis, Inc. v NLRB*, 587 F.2d 403, 409 n.9 (9th Cir. 1978).

The Board's requirement, that an employer give detailed notice of proposed changes before unilaterally implementing them, is a reasonable interpretation of the Act. In dismissing the one-sentence May 21 letter as inadequate, the Board correctly noted that other cases permitting unilateral changes have involved changes fuly described to the union before their implementation. *See, e.g., M & M Building & Electrical Contractors, Inc.*, 262 N.L.R.B. 81 (1982).

We defer to the Board's decision here because it *does not contradict the plain meaning of the Act, see Allied Chemical & Alkali Workers v. Pittsburg Plate Glass Co.*, 404 U.S. 157, 166 (1971), and does not appear to usurp major policy decisions properly made by Congress. *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 318 (1965). In *Ford Motor Co.*, the Supreme Court required deference to a Board determination of what bargaining subjects were "terms or conditions of employment" within the meaning of the Act. 441 U.S. at 495. According to *Ford Motor Co.*, "Congress made a conscious decision to continue its delegation to the Board of the primary responsibility of marking out the scope of the statutory language and *of the statutory duty to bargain." Id.* at 496 (emphasis added). *Ford Motor Co.* involved an interpretation of the Act that determined the subject matter of collective bargaining. The present case does not involve a textual interpretation, but defines the scope of the duty to bargain by defining part of the process that collective bargaining must follow. As such, it is entitled to a substantial deference.

Requiring notice of specific proposals before allowing unilateral changes after an unwarranted delay in bargaining is consistent with our cases that require such notice before impasse and before the right can arise to implement unilateral changes. *E.g., Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 735 (9th Cir. 1981); *Clear Pine Mouldings v. NLRB*, 632 F.2d 721, 729 (9th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981).

An express notice requirement is also harmonious with the policy considerations on which the National Labor Relations Act is based. "The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be chan-

neled into constructive, open discussions leading, it was hoped, to mutual agreement." *H.K. Porter Co., v. NLRB*, 397 U.S. 99, 103 (1970). Disclosure of proposed changes will facilitate open discussions by requiring employers to specify proposed changes in conditions of employment before implementing them unilaterally. Such disclosure will give the unions notice of exactly what might be lost if they waive the opportunity to bargain by continual and unwarranted delay.

We find it unnecessary to decide whether the union's dilatory conduct was unjustified under the circumstances of this case. Even if we assume that the delays were unwarranted, the Board properly concluded that the company implemented unilateral changes in terms and conditions of employment in violation of sections 8(a)(1) and (5) of the Act because the company failed to provide the union with notice of specific proposed changes.

III

Timeliness of the Unfair Labor Practice Charge

Section 10(b) of the Act, 29 U S.C. § 160(b), provides that "no (unfair labor practice) complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board and the service of a copy thereof upon the person against whom such charge is made ...." The limitation period does not begin to run until the party filing the charge knows or has reason to know that an unfair labor practice has occurred. *E.G., Peerless Roofing Co., v. NLRB*, 641 F.2d at 736; *NLRB v. California School of Professional Psychology*, 583 F.2d 1099, 1101-02 (9th Cir. 1978).

We reject Stone's three arguments that the union had actual notice more than six months before January 5, 1981, the date on which Local 1149 filed its unfair labor practice charge. First, Stone contends that the union itself cancelled Stone's contractual obligation in April 1980 and that Stone's May 21 reply noted its desire to make substantial changes. This contention is unavailing. The union's April letter to all signatories of the master agreement merely announced the upcoming expiration of the agreement. It did not purport to cancel the employer's obligation of continued compliance with the expired

agreement. Moreover, Stone's May 21 letter merely announced the company's desire to propose unspecified changes. The letter did not give notice of the unilateral implementation of such changes. It therefore gave no notice of the activity on which the union based its unfair labor practice charge.

Stone's second argument, that the action is time barred because its obligations to the union health and welfare and pension funds accrued outside the limitation period, also lacks merit. In *Peerless*, the court held that the mere accrual of employer liability for contributions did not constitute notice triggering the statute of limitations for an unfair labor practice charge based upon an employer's failure to contribute to union trust funds. 641 F.2d at 736.

Finally, Stone contends that notice of the unilateral changes given by the employer to the union members constituted notice to the union for purposes of triggering the statute of limitations. Nothing in the record suggests, however, that the union members were agents of the union. Therefore, knowledge possessed by the members will not be attributed to Local 1149. *See NLRB v. Belcor*, 652 F.2d 856, 860 (9th Cir. 1981) (a union member may be considered an agent of the union if the union authorizes or condones the member's conduct). Thus, the union's unfair labor charge was timely.

IV
The Remedial Order

The Board's power to effectuate the policies of the Act and to restore the *status quo ante* "is a broad discretionary one, subject to limited judicial review." *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). We will enforce the Board's order if it is based on facts supported by substantial evidence, and on a reasonably defensible interpretation of the law that is consistent with the Act.

Stone raises two objections to that portion of the Board's "make-whole" remedy that required payment of past due contributions to the union's health and welfare and pension funds: (1) the order is punitive because it does not reflect employee loss and provides no offset for benefits provided through the employer-sponsored alternative plan; and (2) the remedy is tantamount to imposing a contractual term on one of the bargaining parties. Neither objection is meritorious.

Stone's first contention, that the order is punitive rather than remedial, conflicts with existing Ninth Circuit precedent. In *NLRB v. Carilli*, 648 F.2d 1206 (9th Cir. 1981), we held that an employer cannot complain of the extra cost of improperly created, substitute fringe benefits. *Id.* at 1217. The company is merely required to repay what is has unlawfully withheld. As in *Carilli*, it was the company that unlawfully chose to incur the additional expense of a private insurance program. Even if Stone's substitute fringe benefit program met the present needs of its employees, the diversion of contributions from the union funds undercut the ability of those funds to provide for future needs.

The company's second claim, that the remedy amounts to the imposition of a contract term, might have more force if the order referred to fringe benefit levels set in the new master agreement. However, the remedy requires back payment at the old level of fringe benefits, not at the level negotiated in the new 1981 master agreement. This claim is without merit.

We enforce the Board's order in its entirety.

PETITION FOR REVIEW DENIED; CROSS-APPLICATION FOR ENFORCEMENT GRANTED.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 32 — CA — 3304

STONE BOAT YARD

and

UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMERICA,
LOCAL 1149, AFL-CIO

DECISION AND ORDER

On January 8, 1982, Administrative Law Judge Gerald A. Wacknov issued the attached Decision in this proceeding. Therafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent therein.

The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing payments to the Union's health and welfare and pension plans and by unilaterally implementing an alternative health insurance plan. The Administrative Law Judge concluded that Respondent did not violate the Act as alleged; therefore, he dismissed the complaint in its entirety.

The relevant facts are not disputed and are set out in detail in the Administrative Law Judge's Decision. The Pacific Coast Metal Trades Master Agreement, herein called the Master Agreement, negotiated by the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and the major shipbuilding companies on the

west coast, was effective July 1, 1977-June 30, 1980. Within Local 1149's jurisdiction, there are approximately eight independent boat yards — companies which are not members of the multiemployer bargaining association. These eight independents, of which Respondent is one, have always become signatories to the Master Agreement. Respondent on July 5, 1977, signed onto the Master Agreement which was to expire June 30, 1980. The 1977-80 Master Agreement required Respondent to make certain payments to the union health and welfare and pension plans. On April 15, 1980,[1] the International wrote Respondent that it sought negotiations for a new agreement. On May 21, Respondent wrote the Union that it intended "to offer substantial changes in the entire contract effective 1 July 1980." Respondent' president testified that he did not specify what the "substantial changes" might be because he expected the Union to respond immediately to his letter. Negotiations between the International and the major shipbuilding companies for a new master agreement commenced on May 29 in Olympia, Washington, and continued throughout June. Respondent made several phone calls in June to the business agent of the Union, but the agent was in Olympia at the negotiations. In late June, Respondent announced to its employees that, effective July 1, Stone Boat Yard was implementing a company-funded medical insurance plan and that effective January 1, 1981, a company-funded program would be implemented. The contract expired June 30; on July 1, Respondent ceased making payments to the Union's health and welfare and pension plans and implemented its company-funded health plan.

In mid-July the rank and file rejected the recently negotiated new Master Agreement. Following further negotiations, a second version of a new master agreement was ratified on approximately August 15. On *August 21 the Union wrote* Respondent outlining the *terms of the new Master Agreement*, stating that those new terms *were effective* July 1, and noting that the new contracts would be available as soon as received from the printers. Seven of the eight independents signed the new Master Agreement. Respondent and the Union held several negotiating meetings but consensus was not reached and Respondent did not sign the new Master Agreement. The Union filed the charge on January 5, 1981.

[1] All dates hereinafter are 1980 unless otherwise specified.

The Administrative Law Judge dismissed the complaint. He began his analysis by quoting the following Board language of *Gordon L. Rayner and Frank H. Clark, d/b/a/ Bay Area Sealers*, 251 NLRB 89, 90 (1980): "[Upon contract expiration, an employer must continue to apply the contract terms which govern the employer/union relationship] unless the employer gives timely notice of its intention to modify a condition of employment and the union fails to timely request bargaining." In the Administrative Law Judge's view, the Board in *Bay Area Sealers* created "an exception" to an employer's general obligation to continue applying the terms of an expired collective-bargaining agreement. He then found that this "exception" applied to the facts of this case. Thus, in the Administrative Law Judge's view; Respondent here gave timely notice of its intention to modify the contract when it wrote that it desired to offer "substantial changes" which would be effective July 1, 1980. Characterizing this notice as "rather pointed language" which should have put the Union on notice that Respondent would not sign a me-too contract, the Administrative Law Judge then focused on the Union's failure to communicate with Respondent from late May until late July. The Administrative Law Judge found that the Union, apparently due to its desire to first negotiate a master contract and then to pressure Respondent into signing that contract, chose to ignore Respondent's May and June requests for bargaining. He concluded that such action falls within the "exception" set out in *Bay Area Sealers* and therefore dismissed the complaint. The General Counsel and the Union except to that conclusion. We find merit in the argument of the General Counsel and the Union.

The record demonstrates that no bargaining impasse had been reached in this case prior to Respondent's unilateral implementation of the changes in the terms and conditions of employment. In addition, there is *no evidence that the Union* here waived *its right to bargain over the changes made by Respondent*, nor is *there evidence that the Union acquieced in Respondent's* action. It does appear that the Union *preferred to bargain* with Respondent after the negotiations with the major companies for a new master agreement had been completed. And it is true that when an employer has diligently and earnestly sought to engage in bargaining and the union has continually avoided or delayed bargaining, the employer is justified under certain circumstances in implementing unilateral changes in the terms and

conditions of employment. See, e.g., *AAA Motor Lines, Inc.* 215 NLRB 793 (1974).[2] However, one of the circumstances which the Board insists upon in such cases is that the employer's unilateral change myst be *consistent with the employer's previous proposal to the union of changes in the expired contract. Ace Galvanizing, Inc.*, 217 NLRB 144, 146 (1975); *Allen W. Bird II, Receiver for Caravelle Boat Company, a Corporation, and Caravelle Boat Company*, 227 NLRB 1355, 1358 (1977). Here, the Respondent never provided the Union any type of written or detailed proposal of changes in the expired contract. As the Union and Respondent did not reach a bargaining impasse, and the Union did not waive its right to bargain about the changes which were implemented, and Respondent did not implement changes which were consistent with any previously rejected offer, Respondent's implementation on July 1 of the changes in terms and conditions of employment violated its duty to bargain. *Dial Tuxedos, Inc.*, 250 NLRB 476 (1980); cf. *AAA, supra* at 794.[3] Accordingly, we hold that Respondent has violated Section 8(a)(5) and (1) of the Act[4] since July 1, 1980, by ceasing to make contributions to the union health and welfare and pension funds and by implementing the company-funded medical insurance plan.[5]

[2]In *AAA*, the employer in April timely notified the union of its intention to terminate the contract and submitted its proposed contract to the union along with a request to commence bargaining. For 2½ months thereafter, the union refused to meet or bargain with the employer. Upon expiration of the contract, the employer unilaterally implemented changes in terms and conditions of employment. All the changes were consistent with the employer's detailed contract proposal, which the union had in its possession for 2½ months.

[3]Our dissenting colleague does not question the long line of Board decisions holding that any changes unilaterally implemented by an employer following contract expiration must, *inter alia*, be consistent with the prior proposal made by the employer during bargaining. See cases cited in the text herein, plus *Peerless Roofing Co., Ltd.*, 247 NLRB 500, 503-504 (1980). In light of that principle, we are at a loss to understand our dissenting colleague's analysis. In effect, he would find that an employer has lawfully made a unilateral change that is consistent with its prior proposal though it has made no prior proposal. It is this internal contradiction that causes us to reject our colleague's analysis.

Additionally, our decision serves to foster and promote stable labor relations. The important functions of informing the union what changes in the contract are sought by the employer and putting the union on notice that after a reasonable period of time union inaction might result in the employer's unilateral implementation of these pro-

CONCLUSIONS OF LAW

1. The Respondent, Stone Boat Yard, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Brotherhood of Carpenters and Joiners of America, Local 1149, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All carpenters, shipwrights, joiners, marine millmen, boatbuilders, stage riggers, wood caulkers, loftsmen, leadingmen, helpers, trainees and apprentices employed by Respondent excluding all other employees, office clerical employees, professional employees,

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posed changes have led the Board, and lead us, to require that an employer provide a union with a written copy of its proposed contract changes prior to unilaterally implementing them. *Peerless Roofing, supra* at 503; *Allen W. Bird, supra* at 1358; *M & M Building and Electrical Contractors, Inc., d/b/a/ M & M Contractors*, 262 NLRB No. 181, sl. op., p. 2 (1982).

[4]The Administrative Law Judge's reading of the "exception" set out in *Bay Area Sealers* is overly broad. An employer is not justified under *Bay Area Sealers* in unilaterally implementing changes in terms or conditions of employment after the contract expires unless, *inter alia*, it first provides the union a written detailed proposal of changes in the expired contract. Here, Respondent simply informed the Union it planned to offer substantial changes in the contract; Respondent never offered any specific changes and never provided the Union a written detailed proposal. Thus, when Respondent unilaterally changed certain terms and conditions of employment, it violated Sec. 8(a)(5).

[5]Respondent argues that the charge here was filed after expiration of the 6-month statute of limitations provided in Sec. 10(b) of the Act. In late June, Respondent announced to the employees that various changes in fringe benefits would be made as of July 1. Respondent maintains that since the Union did not file a charge until January 5, 1981, the charge is untimely filed. The Union argues that it did not have knowledge of the changes until late July or August and that therefore the charge is timely filed. We find the Union's argument persuasive. We note first that the Administrative Law Judge did not rule on this issue, merely stating that in light of his finding to dismiss the complaint on the merits, he deemed it "unnecessary to resolve this issue." More significantly, the relevant testimony — which the Administrative Law Judge failed to cite — does not support Respondent's position. The Union's president testified that he first learned at the end of July or in August of the Respondent's cessation of contributions and implementation of its own medical insurance plan. Respondent's president testified that sometime in August was the first time that the Company informed the Union that it had on July 1 unilaterally implemented a company-funded medical insurance plan. We thus find that the charge of January 5, 1981, was timely filed.

guards, and supervisors as defined in the Act, constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since on or about July, 1977, the above-named labor organization has been the designated exclusive representative of the employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By unilaterally ceasing payments on July 1, 1980, to the health and welfare and pension plans established by the collective-bargaining agreement which expired June 30, 1980, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By unilaterally implementing on July 1, 1980, a medical group insurance plan, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

We have found that the Respondent since July 1, 1980, violated Section 8(a)(5) and (1) of the Act by ceasing to make contributions on behalf of its bargaining unit employees to the Union's health and welfare and pension plans. In order to dissipate the effect of these unfair labor practices, we shall order Respondent to commence taking the required contribution to the respective plans and to transmit to the appropriate plans the contributions it has failed to make since its unlawful cessation of payments.[6] In addition, we shall order Respondent to make whole employees in the unit for the losses or expenses they suffered due to Respondent's unilateral cessation of payments, with interest computed under the "other monetary remedies" category set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).[7]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Stone Boat Yard, Alameda, California, its officers, agents, successors, and assigns, shall:

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[6]Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question whether Respondent must pay any additional amounts into benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. *Merryweather Optical Company*, 240 NLRB 1213 (1979).

[7]See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Nothing in our Decision and Order shall be construed as requiring Respondent to rescind the medical insurance plan benefits, which it unilaterally established, the implementation of which, we find, violated the Act.

1. Cease and desist from:

(a) Refusing to bargain collectively with the United Brotherhood of Carpenters and Joiners of America, Local 1149, AFL-CIO, as the representative of its employees in the appropriate unit described as follows:

> All carpenters, shipwrights, joiners,marine millmen, boatbuilders, stage riggers, wood caulkers, loftsmen, leadingmen, helpers, trainees and apprentices employed by Respondent excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(b) Failing and refusing to make contributions on behalf of its employees in the above-described unit since July 1, 1980, to the United Brotherhood of Carpenters and Joiners of America, Local 1149, AFL-CIO health and welfare and pension plans.

(c) Unilaterally instituting its own medical insurance plan with respect to employees in the above-described appropriate unit.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union as the exclusive representative of employees in the above-described unit and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Restore making payments to the union health and welfare and pension plans as it did prior to the discontinuance of said payments on July 1, 1980, for the employees in the aforesaid unit.

(c) Make employees in the aforesaid unit whole for any losses or expenses they may have suffered as a result of the unilateral discontinuance, as set forth in the section of this Decision and Order entitled "The Remedy."

(d) Pay into the union health and welfare and pension plans those contributions it has failed to pay as a result of said unilateral change.

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at it Alameda, California, facility copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. September 30, 1982.

/s/ John H. Fanning, Member
Don A. Zimmerman, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

[8]In the event that this Order is enforced by a Judgement of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

CHAIRMAN VAN DE WATER, dissenting:

Contrary to my colleagues, I would adopt the Administrative Law Judge's finding that Respondent did not violate Section 8(a)(5) and (1) of the Act by unilaterally implementing changes in its employees' terms and conditions of employment. In my view, Respondent satisfied all of the obligations imposed on it by our statute before making such changes while the Union failed in its concomitant responsibilities.

Respondent is signatory to a multiemployer association shipbuilding agreement herein referred to as the Master Agreement. Respondent is not, however, a member of the multiemployer association; it is referred to as an independent. By letter dated April 15, 1980,[9] the Union informed Respondentthat the then current contract would expire on June 30 and requested that it hear from Respondent "at [Respondent's] earliest convenience" regarding negotiations for a new contract. Richard Folker, Respondent's president, replied in writing on may 21 that Respondent intended to offer "substantial changes in the entire contract effective 1 July 1980." Folker did not specify what these changes might be since he expected the Union to respond immediately.

Upon receiving no response from the Union, Folker telephone the Union's office during early June to arrange a discussion of the contract with the business agent. Folker was repeatedly informed by the Union's receptionist that the business agent was either busy, out of town, or in Portlant, Oregon, for negotiations.[10] Hearing nothing from the Union, Folker met the Respondent's employees, discussed the Company's progress, and announced changes in fringe benefits effective July 1. Also effective that date, Respondent discontinued payments into the Union's health and welfare and pension funds.

Ted Knudson is the Union's business agent. He was actively involved in the Master Agreement negotiations starting at the end of May and continuing through June. The first contact Knudson had with Respondent after Respondent's May 21 letter was on July 22 when Knudson informed Respondent that a second offer had been re-

[9]Add dates are in 1980 unless otherwise indicated.

[10]Negotiations for a new master agreement began in Portland on or about May 29.

ceived from the employer association.[11] Knudson and Folker conversed by phone on July 24 at which time a meeting was set for July 30 to discuss Respondent's assent to the Master Agreement. On August 22, Knudson requested Respondent's signature on the recently ratified master agreement. By this time, Respondent had unilaterally instituted certain contract changes.

Knudson was asked at the hearing whether he responded in any way to Respondent's May 21 letter. He testified that he did not because there was nothing he could say, he was leaving the next day for Portland, and he could not tell Folker anything until the conclusion of the Master Agreement negotiations. Knudson also testified that he informed Union Official Gerald Krahn[12] of Respondent's May 21 letter. Krahn indicated that "they'll [Respondent] just have to wait till we get through here [Portlant] with our negotiations." Knudson obviously complied with Krahn's implied instructions.

On these facts, my colleagues find that Respondent violated Section 8(a)(5) by unilaterally implementing contract changes and ceasing payments into various union benefit funds. They note that no bargaining impasse had been reached, there was no waiver by the Union of its right to bargain over the changes made by Respondent, and there had been no acquiesence by the Union in those changes. My colleagues note, strictly in passing, that "it does appear" that the Union "preferred" to wait until the conclusion of the Master Agreement negotiations before dealing with Respondent.[13] And they admit that, under certain circumstances, an employer may implement changes if the employer has diligently and earnestly sought bargaining and the union has continually avoided or delayed bargaining.

Yet, in spite of the obvious, my colleagues insist that an 8(a)(5) violation has been committed by focusing on the fact that the Employer did not provide the Union with any written or definite contract proposals. In my opinion, their emphasis on this "omission" is mis-

[11]The first tentative Master Agreement was rejected by the Union's membership on June 30.

[12]Krahn sent the Union's reopener letter to Respondent in April.

[13]My colleagues appear to be rather cavalier about these facts in the face of Knudson's uncontradicted testimony.

placed; they have disregarded what Respondent *did* do to meet its obligations. More importantly, they have completely ignored the Union's contribution, or, more accurately, its lack thereof, to this state of affairs.

Upon the expiration of a collective-bargaining contract, an employer must continue to honor the terms and conditions of employment established by that contract. However, under certain circumstances, an employer may be justified in implementing changes in the contract. Where an employer gives timely notice of its intention to modify the contract and the Union fails to timely request bargaining or a bargaining impasse is reached or the union waives its right to bargain or the union acquiesces in the proposed changes, an employer may lawfully implement its changes.[14]

Respondent gave prompt notice of its intention to modify the contract and continued to seek a response from the Union on its request for bargaining. The Union failed, over a prolonged period of time, to respond to the Employer's request.[15] The Union admittedly purposefully delayed, in truth of fact, *avoided*, any contact with Respondent in order to negotiate a new master agreement. Respondent, on the other hand, at all times stood ready, willing, and able to bargain. Respondent anticipated, expected, and sought negotiations; there is no suggestion that Respondent was hostile to the Union or had any intention of bypassing the Union.[16] The Union's course of action demonstrates its intention to avoid any contact with the Respondent during the Master Contract negotiations this decision effectively foreclosed any bargaining. In my view, the Union cannot now be heard to complain.[17]

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[14]*Gordon L. Rayner and Frank H. Clark, d/b/a Bay Area Sealers*, 251 NLRB 89, 90 (1980).

[15]I note that in its reopener letter, the Union requested the courtesy of an early response from Respondent.

[16]See *Kentron of Hawaii, Ltd., Subsidiary of LTV Aerospace Corporation*, 214 NLRB 834, 835 (1974).

[17]The Union could simply have informed Respondent that it would be tied up in other negotiations and that it would have to postpone any bargaining with Respondent. Perhaps Respondent would have accepted the delay. Moreover, the Union

My colleagues place undue emphasis on the fact that Respondent did not provide the Union with a detailed or written contract proposal before effectuating its contract changes. I do not view this as being required by Section 8(d) of the Act.[18] Moreover, considering what the Administrative Law Judge called "this rather pointed language" of Respondent's May 21 letter, the Union should have been on notice that the Employer was not going to accept any new master agreement without bargaining with the Union. Thus, the burden shifted to the Union to pursue the matter.[19] In any event, for the Employer to have given more formal notice under the circumstances would have been futile, for the Union had made a conscious decision to ignore Respondent; the Union clearly did not desire to bargain with this employer until it had resolved matter which it considered to be of superior priority.[20]

In view of the circumstances herein, particularly the Union's steadfast refusal to contact, meet, or bargain with Respondent and Respondent's equally steadfast attempts to pursue bargaining, I conclude that Respondent could, and did, lawfully implement changes in its contract with the Union.

Dated, Washington, D.C. September 30, 1982

John R. Van de Water, Chairman
NATIONAL LABOR
RELATIONS BOARD

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never kept the Respondent informed as to the progress of the Master Agreement negotiations. These simple steps, had they been taken by the Union, might have avoided this proceeding.

[18]Had my colleagues scrutinized my dissent more carefully, they would have seen, by this very statement in the text, that I clearly *do* question the need for an employer to submit contract proposals in situations such as involved herein, before unilaterally implementing the same.

[19]Cf. *Clarkwood Corporation*, 233 NLRB 1172, 1173 (1977), where the Board noted its decision in *Medicenter Mid-South Hospital*, 221 NLRB 670, 678-679 (1975), holding that "[w]hen an employer notifies a union of proposed changes in terms and conditions of employment, *it is incumbent upon the union to act with due diligence* in requesting bargaining." (Emphasis added.) Although the union there did receive notice of contemplated changes, I find the principles equally applicable to the instant situation where the Union was clearly *put* on notice that Respondent *sought* to make changes.

[20]Cf. *AAA Motor Lines, Inc.*, 215 NLRB 793, 794 (1974). The Union's conduct could be characterized as an anticipatory refusal to bargain in that by its actions it clearly intended to only offer the Respondent the identical contract negotiated as a master contract. Since Respondent was not bound by the bargaining, an inflexible attitude by the Union would be violative of Sec. 8(b)(3) of the Act.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT refuse to bargain collectively with the United Brotherhood of Carpenters and Joiners of America, Local 1149, AFL-CIO, as the representative of our employees in the appropriate unit described as follows:

> All carpenters, shipwrights, joiners, marine millmen, boatbuilders, stage riggers, wood caulkers, loftmen, leadingmen, helpers, trainees and apprentices employed by the Employer excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

WE WILL NOT, without bargaining with the Union, discontinue making contributions to the Union's health and welfare and pension plans or make other unilateral changes in your working conditions without first bargaining with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request, bargain collectively with the Union as the exclusive representative of employees in the above-described appropriate unit and, if an agreement is reached, embody such agreement in a signed contract.

WE WILL resume making payments into the Union's health and welfare and pension plans as existed prior to our discontinuance of such payments on July 1, 1980, and WE WILL

pay into said plans all those contributions we have failed to pay as a result of unilateral actions.

WE WILL make employees in said unit whole for any losses or expenses they may have suffered as a result of said unilateral discontinuance, with interest.

STONE BOAT YARD
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Breuner Building, 2d floor, 2201 Broadway, P.O. Box 12983, Oakland, California 94604, Telephone 415-373-6122.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Case 32-CA-3304

STONE BOAT YARD

AND

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, LOCAL 1149, AFL-CIO

Ariel L. Sotolongo, Atty., of Oakland,
CA, for the General Counsel.
Herbert S. Matthews, Atty., of South
San Francisco, CA for the
Respondent.
Van Bourg, Allen, Weinberg & Roger by
David A. Rosenfeld, Atty., of
San Francisco, CA for the
Charging Party.

DECISION

Statement of the Case

GERALD A. WACKNOV, Administrative Law Judge: Pursuant to notice, a hearing with respect to this matter was held before me in Oakland, California, on September 9, 1981. The initial charge was filed on January 5, 1981, by United Brotherhood of Carpenters and Joiners of America, Local 1149, AFL-CIO (herein called the Union).

Thereafter, on February 23, 1981, the Regional Director for Region 32 of the National Labor Relations Board (herein called the Board) issued a complaint and notice of hearing alleging a violation by Stone Boat Yard (herein called Respondent) of Section 8(a)(5) and

(1) of the National Labor Relations Act, as amended (herein called the Act).

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses and to introduce relevant evidence. Counsel for the General Counsel and counsel for the Charging Party presented oral argument at the hearing. Since the close of the hearing, a brief has been received from counsel for Respondent.

Upon the entire record, and based upon my observation of the witnesses and consideration of the arguments presented and the brief submitted, I make the following:

Findings of Fact

I. Jurisdiction

Respondent is a Califoria corporation with an office and place of business located in Alameda, California, where it has been engaged in operating a boat building and repair yard. Respondent, in the course and conduct of its business operations, annually derives gross revenues in excess of $500,000, a substantial portion of which reflects work performed for pleasure, rather than commercial, boat owners, and during the past 12 months preceding the hearing herein has performed services valued in excess of $5,000 for the United States Government.

As Respondent's business operations meet the Board's retail jurisdictional standards, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

It is admitted that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practice

A. *The Issues*

The principal issue raised by the pleadings is whether Respondent has violated and is violating Section 8(a)(5) and (1) of the Act by announcing and implementing changes in employees' benefits.

B. *The Facts*

The salient facts are not in material dispute.

The Respondent and Union have maintained a collective-bargaining relationship since at least 1977, when the Respondent became a signatory to the standard multi-employer association shipbuilding agreement. The most recent association agreement, entitled the Pacific Coast Metal Trades Master Agreement, expired on June 30, 1980.

On April 15, 1980, the Union sent the following contract reopening letter to Respondent:

> In accordance with Article 34 of the current Agreement between the Pacific Coast Marine Carpenters' Council and Employers' engaged in shipbuilding and repair, boat building and allied industries. This is notification that the current Agreement and any or all addendums or understandings, expires at midnight June 30, 1980.
>
> May we hear from you at your earliest convenience on making arrangements to begin negotiations for a new Agreement.

The agreement contains the following pertinent provisions:

> This Agreement, effective July 1, 1977, shall remain in full force and effect until June 30, 1980, and from year to year thereafter, unless either Party shall, at least sixty (60) days, but not more than ninety (90) days prior to any anniversary date, notify the other Party in writing of any desire to make changes in or to terminate this Agreement.
>
> * * *
>
> All existing Practices, Customs, Understandings or Local Agreements of any nature whatsoever, whether expressly covered by the Master Agreements or otherwise, will continue in effect unchanged until June 30, 1980, except as specifically modified as provided herein or by Mutual Agreement between the Parties.

On May 21, 1980, Respondent's president, Richard Folker, sent the following written reply: [1]

> This notifies you in accordance with the subject article that it is the intent of Stone Boat Yard Inc. to offer substantial changes in the entire contract effective 1 July 1980.

The letter was sent to the Portland, Oregon address appearing on the Union's April 15 reopening letter, but was returned. Thereupon, Folker sent it to the Union's Oakland, California address. It was received by the Union on May 28, 1980.

Folker testified that he did not deem it necessary to specify the nature of the "substantial changes" he desired to negotiate, as he expected to present these matters to the union representative whom he anticipated would contact him forthwith. There being no response from the Union, Folker called the union office several times during the month of June in order to request that the Union's business agent meet with him to discuss the contract, but was told by the receptionist on these various occasions that the business representative was either busy, out of town or unavailable due to his participation in contract negotiations in Portland, Oregon.

Ted Knudson is financial secretary and business representative of the local. Commencing the last part of May, and throughout the month of June, Knudson was preoccupied with negotiations involving the master agreement. These negotiations, conducted in Portland, Oregon, began on about May 29. On about June 30, the Union's membership failed to ratify the tentative agreement which had been reached by the bargaining representatives, and negotiations continued thereafter.

On July 22, Knudson sent Respondent the following form letter:

> We have been informed the Negotiating Committee has received a second offer from the Ship Builders Association which will be voted on by the members. The new contract will call for 90 [cents] per hour increase effective July 1, 1980, which will

[1] The record indicates that Folker apparently spoke to a union representative about the matter prior to May 21, 1980, but the record contains no evidence regarding the substance of the conversation.

make the Journeyman rate of $11.57 per hour. Fringe benefits will be increased 25 [cents] per hour which will make Health & Welfare contribution of 93 [cents] per hour, and Pension contribution of $1.23 per hour.

When the contract is approved by the members, copies of the complete agreement will be made available to you for your signature.

On July 24, Folker phoned Knudson. While there is no record testimony of the substance of this conversation, Folker's terse notes indicate that he advised Knudson of the necessity for a conference at Respondent's premises in order to "determine the extent of union involvement." Knudson's notes of the same conversation state, "Rich Folker called to say he would not sign an agreement but would like to talk regarding an opened shop arrangement." Knudson testified that he assumed Folker's reference to an opened shop arrangement meant he would not sign the master agreement. Apparently, during this conversation, a meeting was arranged for July 30, and it was held as scheduled.

The master contract was ratified on about August 13. By letter dated August 21, Knudson advised Respondent of this fact, and set forth the new wages and fringe benefits amounts embodied in the master agreement, stating that such amounts are "now due and payable," and that "The new contracts will be made available to you as soon as they are received from the printers."

Knudson testified that the local union organizers are "delegated to go out and get these independents [such as Respondent] to sign the same agreement as the master agreement," and that the Union has a strong policy to have the independents execute the same contract, at least to cost items including wages, holidays, health and welfare and pensions. Knudson stated that "we don't really negotiate with the independents ... that over the past years have always signed what comes out of the master agreement."

Knudson testified that he was gone most all of June. On July 30, at the meeting, Knudson was hopeful that he could get the master agreement signed, and alterations could probably be discussed.

Acknowledging that he received Folker's May 21 letter to reopen negotiations, Knudson testified that he did not respond in any way because there was nothing he could say. Thus, Knudson explained that negotiations on the master contract were soon to commence, that he would be unavailable during the month of June, and that negotiations with the independents could not begin until the master negotiations were concluded. He discussed the matter with Gerald Krahn, a Union official, who sent the initial April 15 reopening letter, and Krahn said the Respondent would just have to wait until the master agreement was negotiated. Thereafter, Knudson made no effort to contact Respondent until July 22 when he sent the aforementioned form letter to Respondent and other independents.

Having not heard from the Union, Folker held a meeting with his employees in late June. While the details of the meeting are not contained in the record, Folker apparently presented a verbal synopsis of the progress the company had made, and announced various changes in fringe benefits. He also distributed a letter to each of the employees entitled "Company Progress Report," which states, *inter alia*, as follows:

> It is the policy of this company to contine to pay above average wages and offer company benefits of the finest quality available in the insurance market. Therefore, on July 1, 1980 the Prudential Life Insurance Company and Stone Boat Yard will jointly implement a medical group insurance plan for all employees and their dependents. The cost of the plan will be borne by Stone Boat Yard. The scope of coverage is extremely broad, matching or improving upon any other plans of its type. A minimum of 10 employees is required. Those who desire to continue their present coverage may do so by meerely filing a change over form permitting Stone Boat Yard to pay direct to the desired facility. However, a thorough evaluation of this comprehensive program is imperative before making any choices. We will have a representative from Prudential go over every aspect of the plan on Tuesday, June 24th at 8:00 a.m. On or before 1 January 1981, a retirement program also operated by the Prudential Life Insurance company will be implemented permitting everyone over the age of 24 to participate. This is an exciting financial opportunity not only for the employee but for the busi-

> ness. It is designed to give the employee a vested interest in his personal retirement fund only two years after starting and 100% vested interest after 10 years. This too will be the subject of a meeting with experts from Prudential later this summer. The questions of the relationship of other retirement programs you may have with this one can be resolved.
>
> * * *
>
> After 1 July 1980, all employees will be covered for Medical and Dental through the Prudential Life Insurance Company at no expense to the employees.

Folker testified that as of July 1, he discontinued payments to the Union's health and welfare fund, and instituted the medical group insurance plan which was entirely funded by Respondent. Moreover, he ceased payments to the Union pension fund.

The record shows that the parties had several negotiating sessions after July 30, but that they were unable to reach agreement on the terms of a successor contract.

C. Analysis and Conclusions

In *Gordon L. Rayner and Frank H. Clark, d/b/a Bay Area Sealers*, 251 NLRB 89, the Board noted an exception to an employer's general obligation to continue applying the terms of an expired collective-bargining agreement, as follows:

> Although an employer's contractual obligations cease with the expiration of the contract, those terms and conditions established by the contract and governing the employer-union relationship survive the contract and present the employer with a continuing obligation to apply those terms and conditions, unless the employer gives timely notice of its intention to modify a condition of employment and the union fails to timely request bargaining, or impasse is reached during bargaining over the proposed change.[2]

[2]Similarly, an employer's unilateral implementation of changes in employees' terms and conditions of employment may be justified by waiver or acquiescence of the employees' collective-bargaining representative. *A-V Corporation*, 209 NLRB 451, 453, and cases cited therein at footnote 8.

In *Bay Area Sealers* the employer sent a termination notice to the union together with an offer to enter into negotiations for a new contract. Significantly, the Board found that the Union's failure to reply to the notice did not affect the employer's continuing obligation to apply the terms and conditions of the terminated contract, as the employer argued, rationalizing that the employer's prior unremedied unfair labor practices precluded such a defense.

In the instant case both parties gave timely notification of their desire to modify the cotract.[3] The Union requested a prompt reply from Respondent in order to arrange for the commencement of negotiations. Thereafter, the Union was timely advised; more than a month prior to the contract's expiration, of the Respondent's intention to offer "substantial changes in the entire contract effective 1 July 1 1980." Despite this rather pointed language which should, I find, have reasonably put the Union on notice that Respondent was not simply willing to sign a "me too" association contract, the Union did nothing to even attempt to discern what the Respondent had in mind. Nor was the Union's lack of diligence[4] simply inadvertent, but rather its failure to act was the result of a conscious decision by union representatives who, after specifically discussing the matter, arrived at the conclusion that there was nothing the Union was in a position to then bargain about. Thus, rather than attempt to commence negotiations or seek Respondent's agreement to postpone them, the Union, preoccupied with the master agreement negotiations, completely ignored Respondent's attempts to negotiate.

There is no contention that the Respondent was attempting to evade its bargaining obligation or that its conduct was discriminatorily motivated. To the contrary, the record evidence shows, and I find, that Folker made several telephonic attempts to commence negotiations, but that his efforts were ignored. Thereupon he announced his

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[3]I find no merit in Respondent's argument that the Union's April 15 notice language permitted the Respondent to unilaterally terminate any contract benefits upon the expiration of the contract, as neither such language, nor the record as a whole, constitutes the necessary clear and unmistakalbe evidence which would support the Respondent's argument in this regard. See *Wayne's Olive Knoll Farms, Inc. d/b/a/ Wayne's Dairy*, 223 NLRB 260, 265.

[4]See *American Business, Inc.*, 164 NLRB 1055, 1056.

intentions regarding health insurance and a pension plan to each of his employees, in writing, prior to the expiration of the contract. And following the implementation of the health insurance plan, totally funded by Respondent, contract negotiations commenced and continued until some months later when the instant charge was filed. The General Counsel representated at the hearing that it was not being contended that the Respondent bargained in bad faith following the commencement of negotiations.

Further, the record evidence demonstrates that even if the Union had been advised with particularly that the Respondent intended to institute the changes in health insurance and in the pension plan upon the expiration of the contract, the likelihood of meaningful bargaining would have been precluded by the Union's virtual inability to negotiate such changes pending resolution of the master agreement. Indeed, the Union's business representative virtually admitted that he lacked the authority to negotiate any substantive terms and conditions which deviated from those of the master agreement. See *U.S. Lingerie Corporation*. 170 NLRB 750, 752.

Respondent also maintains that the charge herein is barred by Section 10(b) of the Act, which establishes a 6-month statute of limitations period. The changes which Respondent implemented on July 1 were announced to the employees in late June, and the charge was filed on January 5, 1981, beyond the limitations period. Nevertheless, the Union maintains that it had no knowledge of the changes until late July or August, and that the 10(b) period would not begin to run until that time.[5] It is difficult to believe that the Union would not have obtained knowledge of Respondent's incentions as early as late June when the employees were so advised, in writing. Moreover, it would appear that the Union's alleged lack of knowledge resulted from its failure to exercise reasonable diligence in contacting the Respondent, as stated above. However, in light of my findings below, I deem it unnecessary to resolve this issue.

On the basis of the foregoing, I find the record evidence and cases cited by the General Counsel and Union during oral argument[6] insuf-

[5]See *Wisconsin Valley District Council*, 211 NLRB 222, 227, enfd. 532 F.2d 47 (C.A. 7, 1976).

ficient to establish that the Respondent has violated the Act as alleged, and I shall therefore dismiss the complaint herein.

Conclusion of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged.

Based on the foregoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[7]

ORDER

The complaint is dismissed in its entirety.

Dated: January 8, 1982

S/ Gerald A. Wacknov
Administrative Law Judge

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[6]The following additional cases, cited by the General Counsel and Charging Party, appear to be inapposite to the issues presented herein and are clearly distinguishable: *Wayne's Olive Knoll Farms, Inc. d/b/a Wayne's Dairy, supra; Capitol Roof and Supply Company, Inc.* 217 NLRB 1004; *Peerless Roofing Co., Ltd.*, 247 NLRB No. 72, enfd. 641 F.2d 734 (C.A. 9, 1981).

[7]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ADDENDUM SETTING FORTH RELEVANT STATUTORY PROVISIONS

Sections of the Labor-Management Relations Act.

Sec. 8 (a) Employer Unfair Labor Practices. 29 U.S.C. 158 (a)

(a)

It shall be an unfair labor practice for an employer —

Sec. 8 (a)(1) — Interference; Restraint; Coercion, 29 U.S.C. 158 (a)(1)

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

Sec. 8 (a)(5) — Refusal to Bargain 29 U.S.C. 158(a)(5)

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)

Sec. 8 (d) — Duties of Parties in Collective Bargaining. 29 U.S.C. 158 (d)

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any ageement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, that where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a disputre, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions to the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

Sec. 10 (b) — Complaint and Notice of Hearing; Sixth-Month Limitation; Answer; Rules of Evidence. 29 U.S.C. 160 (b)

(b)Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by

reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.

Sec. 10 (e) — Petition to Court for Enforcement of Order; Proceedings; Review of Judgment. 29 U.S.C. 160 (e)

(e)The Board shall have power to petition any United States court of appeals, or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional

evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provide, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

Section 10 (f) — Review of Final Order of Board on Petition to Court. 29 U.S.C. 160 (f)

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court of the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same

jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

DECLARATION OF NO CORPORATE AFFILIATIONS PER RULE 28.1

I declare, under penalty of perjury, that Petitioner, Stone Boat Yard, has no parent, subsidiary, or other affiliations as those terms are used in Rule 28.1

S/ Herbert S. Matthews
Attorney for Stone Boat Yard

Date: December 30, 1983

At: South San Francisco, California

No. 83-1198

Office - Supreme Court, U.S
FILED
MAR 26 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

STONE BOAT YARD, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board reasonably found that petitioner violated Section 8(a)(5) and (1) of the Act by unilaterally changing fringe benefits after the expiration of the collective bargaining agreement without first informing the bargaining agent of the specific changes it intended to make.

2. Whether the Board properly found that the unfair labor practice charge was not time-barred.

3. Whether the Board's remedial order was reasonable and proper.

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In the Supreme Court of the United States

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NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 715 F.2d 441. The decision and order of the National Labor Relations Board (Pet. App. 9a-34a) is reported at 264 N.L.R.B. No. 130.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1983. The petition for a writ of certiorari was filed on December 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act (the Act), 29 U.S.C. (& Supp. V) 151 *et seq.*, are set forth at Pet. App. 35a-39a.

STATEMENT

1. The collective bargaining agreement between Stone Boat Yard (the Company), an independent boat building and repair yard, and Local 1149 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, was traditionally based on a master agreement negotiated between a multi-employer trade association, the Pacific Coast Ship Builders Association, and the Pacific Coast Marine Carpenters' Council. The most recent master contract was effective from July 1, 1977 to June 30, 1980. Pet. App. 9a-10a, 27a. In July 1977, the Company and Local 1149 agreed, with some modifications, to be bound by that agreement (*id.* at 10a, 27a).

On April 15, 1980,[1] two and one-half months before the 1977-1980 master agreement was to expire, the Carpenters' Council secretary, Gerald Krahn, sent to all signatory employers notification that the master agreement would terminate on June 30 and requested to "hear from [them at their] earliest convenience on making arrangements to begin negotiations for a new Agreement" (Pet. App. 10a, 27a). Five weeks later, on May 21, Company President Richard Folker replied with a one-sentence letter to Local 1149's financial secretary and business agent, Ted Knudson: "This notifies you * * * that it is the intent of [the Company] to offer substantial changes in the entire contract effective 1 July 1980" (*id.* at 28a). Folker gave no indication of the particular contract changes he had in mind. Knudson received the letter a day or so before May 29, when negotiations for a new master agreement were scheduled to begin in Portland, Oregon. When Knudson arrived in Portland, Carpenters' Council Secretary Krahn said discussions with the independent employers would not begin until the master negotiations were completed. *Id.* at 10a, 28a, 30a.

Knudson was preoccupied in Portland representing Local 1149 in the master contract negotiations until late June, when the parties agreed on a tentative contract. In

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[1] Unless otherwise noted, all dates herein are in 1980.

early June, while Knudson was bargaining in Portland, Company President Folker called Knudson's office in Oakland several times to arrange for bargaining negotiations, but was told by Local 1149's receptionist that union officials were tied up in negotiations for a new master contract. Pet. App. 10a, 28a.

In late June, while Knudson was still preoccupied in Portland, Folker called an employee meeting in which he announced that, as of July 1, the Company would unilaterally institute a medical and dental group insurance plan at no cost to the employees. As of July 1, the Company instituted its own health plan and discontinued payments to Local 1149's health and welfare plan and pension plan. Pet. App. 10a, 30a-31a. The Company did not give Local 1149 any advance notice of these changes and did not inform the Local that it would implement such changes unilaterally (*id.* at 12a).

Meanwhile, the Carpenters' Council and the Ship Builders Association tentatively reached agreement on a new master contract, but, on or about June 30, the union members refused to ratify the agreement. Subsequently, the Ship Builders Association improved its contract offer, and, on July 22, Knudson wrote to the Company describing the improvements and stating that, when the contract is ratified, it would be presented to the Company for signature. Pet. App. 10a, 29a-31a. Two days later, on July 24, Folker told Knudson that he would not sign the master agreement. In late July or early August, Knudson learned for the first time that the Company had ceased making contributions to the health and welfare and pension plans. *Id.* at 13a n.5, 29a.

On August 21, Knudson sent notice to the Company that the membership had ratified the master agreement; Knudson described the benefits, stated that these benefits were payable retroactively to July 1, and said the contract would

be made available for execution as soon as it was received from the printer (Pet. App. 10a, 28a-29a). Subsequently, representatives of the Company and Local 1149 met, but the Company refused to sign the master contract (*id.* at 10a, 31a).

2. The Board (then-Chairman Van de Water dissenting) found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by unilaterally discontinuing payments to the health and welfare and pension plans and by unilaterally implementing a medical group insurance plan (Pet. App. 9a-34a). The Board noted that, where an employer has made a specific proposal to change terms of employment after the expiration of a contract about which the union has "avoided or delayed bargaining," the employer may unilaterally implement its proposed change (*id.* at 11a-13a & n.3). The Board found that that principle had no application here, however, because the Company "never provided the Union any type of written or detailed proposal of changes in the expired contract * * * and * * * did not implement changes which were consistent with any previously rejected offer" (*id.* at 12a).

The Board rejected the Company's argument that Local 1149's unfair labor practice charge was time-barred by the six-month limitations period in Section 10(b) of the Act, 29 U.S.C. 160(b). The Board noted that, although the changes in fringe benefits were implemented on July 1, Local 1149's business agent, Ted Knudson, learned of these changes for the first time in late July or early August. Moreover, Company President Folker testified that the Company informed the Union of the changes sometime in August. Because the unfair labor practice charge was filed on January 5, 1981, within six months after the Union learned of the unilateral action, the Board held that it was not time barred. Pet. App. 13a n.5.

The Board ordered the Company, inter alia, to pay to the health and welfare and pension plans the contributions the Company had failed to make as a result of its unilateral actions, and to make the employees whole for losses or expenses they may have suffered as a result of the Company's unilateral actions (Pet. App. 15a-17a).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 1a-8a). The court concluded that "[t]he Board's requirement, that an employer give detailed notice of proposed changes before unilaterally implementing them, is a reasonable interpretation of the Act" (*id.* at 5a). The court explained (*id.* at 6a):

> Disclosure of proposed changes will facilitate open discussions by requiring employers to specify proposed changes in conditions of employment before implementing them unilaterally. Such disclosure will give the unions notice of exactly what might be lost if they waive the opportunity to bargain by continual and unwarranted delay.

The court of appeals further agreed with the Board that the six-month limitations period of Section 10(b) of the Act, 29 U.S.C. 160(b), "does not begin to run until the party filing the charge knows or has reason to know that an unfair labor practice has occurred" (Pet. App. 6a), and it rejected the Company's argument that the Union had notice of the unfair labor practice more than six months before the date on which the change was filed (*id.* at 6a-7a). Finally, the court rejected the Company's argument that the portions of the Board's order that require it to make employees whole and to pay past due contributions to the Union's health and welfare and pension funds were punitive because they did not take into account benefits employees received through the alternative medical group insurance plan unilaterally provided by the Company (*id.* at 7a-8a).

ARGUMENT

1. Petitioner concedes (Pet. 4-5) that the expiration of the collective agreement did not entitle it to unilaterally change the existing terms of employment.[2] Petitioner contends (Pet. 5-6), however, that, despite never having notified the Union concerning the fringe benefit changes it intended to make, it was entitled to make those changes because the Union did not respond to its attempts to begin negotiations. This contention is without merit.

The Board has held that, where an employer has diligently sought to bargain and the union has avoided or delayed bargaining, the employer may unilaterally change employment terms but only if such changes are "consistent with the employer's previous proposal to the union of changes in the expired contract" (Pet. App. 12a (emphasis omitted). The court of appeals correctly concluded (*id.* at 5a) that "[t]he Board's requirement, that an employer give detailed notice of proposed changes before unilaterally implementing them, is a reasonable interpretation of the Act." As the Board explained (*id.* at 12a-13a n.3), such disclosure serves the "important functions of informing the union what changes in the contract are sought by the employer and putting the union on notice that after a reasonable period of time union inaction might result in the

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[2]Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees," precludes an employer from unilaterally changing wages, hours and other terms and conditions of employment. *NLRB* v. *Katz*, 369 U.S. 736, 742-747 (1962); *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 209-210 (1964). A collective agreement "survives its expiration date for purposes of marking the status quo as to wages and working conditions. The employer is required to maintain that status quo following the expiration of the collective bargaining agreement until the parties negotiate a new agreement or bargain in good faith to impasse." *NLRB* v. *Carilli*, 648 F.2d 1206, 1214 (9th Cir. 1981). Accord, *NLRB* v. *Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982); *Industrial Union of Marine & Shipbuilding Workers* v. *NLRB*, 320 F.2d 615, 620 (3d Cir. 1963), cert. denied, 375 U.S. 984 (1964).

employer's unilateral implementation of these proposed changes." Further, as the court below recognized (*id.* at 5a), requiring disclosure of proposed changes is in harmony with standards governing unilateral changes following bargaining impasse. Thus, it is well settled that such changes must be reasonably comprehended in the terms of the employer's previous contract offers to the union and "[t]he Union must be given a chance to discuss the specifics of any proposal before it is implemented * * *." *Peerless Roofing Co.* v. *NLRB*, 641 F.2d 734, 735 (9th Cir. 1981). Accord, *Winn-Dixie Stores, Inc.* v. *NLRB*, 567 F.2d 1343, 1350 (5th Cir.), cert. denied, 439 U.S. 985 (1978).

Petitioner complains (Pet. 6) that the Board's rule requires it "to remain in the union fringe benefit plans after the contractual obligation to do so has expired and until such time as the Union has decided to be available to this individual company for negotiations." The Board's rule commands no such result. All the Company had to do was to mail the Union a copy of its proposed change with a notice that it intended to implement that proposal; if, after having received such notice, the Union had continued to refuse to bargain, the Company could have implemented the change. See *AAA Motor Lines, Inc.*, 215 N.L.R.B. 793, 794 (1974). Here, however, the Company did not notify the Union of the content of its proposed changes, but merely sent it a letter in May stating that it intended "to offer substantial changes in the entire contract effective 1 July 1980" (Pet. App. 10a, 28a).

2. Petitioner contends (Pet. 7-8) that the settled rule that the six-month limitations period contained in Section 10(b) of the Act, 29 U.S.C. 160(b), does not begin to run until the

charging party learns of the unlawful activity[3] should not be applied here because it was the Union's own refusal to bargain that kept it ignorant of the Company's action. As pointed out above, however, the Union cannot be faulted for waiting until the Company notified it of the specific changes the Company intended to make. Moreover, it should be noted that the Union's refusal to negotiate was in accordance with the parties' custom of negotiating the master agreement before engaging in individual negotiations with the independents. Contrary to petitioner's suggestion (Pet. 6, 8), there is no finding here that the Union was derelict with respect to its statutory obligation to represent the Company's employees.

3. Where an employer has committed an unfair labor practice by discontinuing payments to a union's trust funds, the Board may require the employer to restore the status quo ante by making employees whole for losses or expenses, by repaying all monies that have been unlawfully withheld from the union's trust funds, and by continuing to make such payments until the parties negotiate in good faith to a new contract or to impasse. See *NLRB* v. *Carilli*, 648 F.2d 1206, 1217 (9th Cir. 1981); *Peerless Roofing Co.* v. *NLRB*, 641 F.2d at 736; *Hinson* v. *NLRB*, 428 F.2d 133, 136-138 (8th Cir. 1970).

There is no merit to petitioner's contention (Pet. 6-7) that the Board's remedial order is "punitive" insofar as it requires retroactive payments to the Union's benefit funds, without a showing of employee loss and with no offset for the Company-sponsored medical insurance plan. As the court below properly concluded (Pet. App. 8a (citation omitted)):

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[3] *Peerless Roofing Co.* v. *NLRB*, 641 F.2d at 736; *NLRB* v. *Allied Products Corp.*, 548 F.2d 644, 650 (6th Cir. 1977).

> [A]n employer cannot complain of the extra cost of improperly created, substitute fringe benefits. The company is merely required to repay what it has unlawfully withheld. * * * Even if [petitioner's] substitute fringe benefit program met the present needs of its employees, the diversion of contributions from the union funds undercut the ability of those funds to provide for future needs.

Carpenter Sprinkler Corp. v. *NLRB*, 605 F.2d 60 (2d Cir. 1979), cited by petitioner (Pet. 7), is factually distinguishable from this case. There, in refusing to enforce the Board's order for retroactive payments to the union's welfare, health, and pension funds, the Second Circuit stated (605 F.2d at 69):

> [W]e do not hold that the Board can never order remedial action of the type here. In appropriate cases, restitution orders and requirements of return to the *status quo ante* can be effective ways of implementing the policies of the Act. In the circumstances of this case, however, where a small employer in an economically depresssed region with twenty years of good relations with the union makes unilateral changes after some indication that an impasse in bargaining had occurred, extensive and financially crippling remedial action * * * should not be enforced.

No such circumstances exist here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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